No. 08-1146

In the
Supreme Court of the United States

CHARLIE D. BROWN, TRUSTEE OF THE KATELYN ANDREWS SEGREGATED SETTLEMENT ACCOUNT,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE,
Respondent.

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the formula enacted by the North Carolina General Assembly in N.C. Gen. Stat. § 108A-57(a) for allocating settlement proceeds when the State holds a subrogation interest with respect to Medicaid payments made by the State is consistent with this Court's decision in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006).

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The opinion of the North Carolina Supreme Court (Pet. App. 1a-25a) is reported at *Andrews v. Haygood*, 362 N.C. 599, 669 S.E.2d 310 (2008). The opinion of the North Carolina Court of Appeals (Pet. App. 26a-39a) is reported at *Andrews v. Haygood*, 188 N.C. App. 244, 655 S.E.2d 440 (2008). The opinion of the Superior Court judge is unreported. Although Supreme Court Rule 14.1(i) directs that the petition shall include the Superior Court's opinion, only excerpts are included in the appendix to the petition (Pet. App. 40a-41a).

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on December 12, 2008 (Pet. App. 1a). The petition for writ of certiorari was filed on March 12, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT

Katelyn Andrews suffered permanent injuries as a result of complications during her birth. Due to those injuries, Andrews received numerous medical treatments that were paid by North Carolina's Medicaid Plan. Specifically, Respondent paid a total of $1,046,681.94 for Andrews' medical expenses.

Andrews, through her guardian ad litem, brought this medical malpractice action in February 2004 in Superior Court in Alamance County, North Carolina against the hospital, physicians and nurses responsible for her mother's labor and delivery. In her complaint, Andrews sought to recover her past medical expenses and other damages. In 2005, Andrews obtained a multi-million dollar settlement of those claims.[1]

In connection with the settlement, a segregated settlement account was created with Petitioner Charlie Brown being appointed as trustee. Several months later, the North Carolina Department of Health and Human Services ("NC DHHS") was notified of the settlement in conjunction with a motion by Petitioner Charlie Brown to distribute funds from the segregated settlement account. NC DHHS moved to intervene in the action and sought an order directing that NC DHHS be reimbursed for the medical expenses that it had paid on Andrews' behalf.

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[1] At the urging of Andrews and the defendants, the trial court issued an order sealing both the settlement agreements, the court's order approving the settlement agreements and the court's order directing that Respondent be reimbursed. Thus, this Court does not have the benefit of any of these documents as it considers the petition. The petition merely includes excerpts from the trial court's order. Pet. App. 40a-41a.

On July 10, 2006, the Superior Court granted NC DHHS' motion to intervene. Because the amount of the medical expenses paid by Respondent ($1,046,681.94) was less than one-third of the settlement, the Superior Court ordered that the sum of $1,046,681.94 be distributed to NC DHHS as reimbursement for past medical expenses. Pet. App. 40a-41a; *see* N.C. Gen. Stat. § 108A-57 (2009) (capping State's recovery at one-third of settlement or award); *Andrews,* 669 S.E.2d at 311 (noting that amount of past medical expenses paid by NC DHHS was less than one-third of the settlement).

Before the Superior Court, Petitioner argued that North Carolina's Medicaid allocation statute, N.C. Gen. Stat. § 108A-57, is inconsistent with the federal anti-lien statute, 42 U.S.C. § 1396p, and this Court's decision in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006), construing that federal statute. The North Carolina statute allows NC DHHS to seek reimbursement for past medical expenses but caps the State's recovery at one-third of any settlement or award. N.C. Gen. Stat. § 108A-57.

Petitioner appealed the decision of the Superior Court to the North Carolina Court of Appeals. The Court of Appeals held that the trial court properly concluded that the State had a valid subrogation interest in the settlement proceeds, "subject to the one-

third statutory limitation." 655 S.E.2d at 444. Judge Wynn dissented, concluding that "*Ahlborn* dictates that the trial court must hold an evidentiary hearing as to what portion of the settlement is designated for medical expenses." *Id.* at 446 (Wynn, J., dissenting).

On appeal to the North Carolina Supreme Court, the court rejected Petitioner's argument that the North Carolina statute runs afoul of this Court's decision in *Ahlborn*. The North Carolina Supreme Court concluded that the *Ahlborn* decision was distinguishable for two reasons. First, in *Ahlborn*, Arkansas had stipulated that only one-sixth of the settlement funds at issue were attributable to past medical expenses paid by Arkansas. Here, North Carolina had made no such stipulation. Second, the *Ahlborn* decision indicates that it may be appropriate for a State to adopt an allocation formula designed to eliminate "settlement manipulation" by the litigants. 547 U.S. at 288 n.18. The North Carolina Supreme Court noted that the *Ahlborn* decision does not "require a specific method for determining the portion of a settlement that represents the recovery of medical expenses," instead leaving "to the States the decision on the measures to employ in the operation of their Medicaid programs." 669 S.E.2d at 313. The North Carolina Supreme Court proceeded to conclude that the allocation formula set out in the state statute is "a reasonable framework that comports with the

requirements of federal Medicaid law as interpreted by *Ahlborn*." *Id.* at 314.

In concluding that the North Carolina statute stands as an appropriate allocation formula under *Ahlborn*, the North Carolina Supreme Court explained that the state statute "defines 'the portion of the settlement that represents payment for medical expenses' as the lesser of the State's past medical expenditures or one-third of the plaintiff's total recovery, limiting the State's reimbursement to the portion so designated." *Id.* at 314. The Court then held that: "The one-third limitation of section 108A-57(a) thus comports with *Ahlborn* by providing a reasonable method for determining the State's medical reimbursements, which it is required to seek in accordance with federal Medicaid law." *Id.* The North Carolina Supreme Court concluded that the statutory scheme "protects plaintiffs' interests while promoting efficiency in Medicaid reimbursement cases throughout North Carolina," noting that the legislature may appropriately consider factors "such as the strain on resources" that would result from the State having "to participate in evidentiary allocation hearings each time a Medicaid recipient recovers from a third party." *Id.*

Justice Hudson, joined by two other justices, dissented. Justice Hudson opined that the *Ahlborn* decision prohibits a State from seeking reimbursement

unless the settlement proceeds are specifically "earmarked" by the Medicaid recipient and the tortfeasor as reimbursing the recipient for actual medical expenses. *Id.* at 316 (Hudson, J., dissenting). She further opined that even though "neither party had raised the issue," the North Carolina statute violates the Contract Clause, U.S. Const. art. I, § 10, cl. 1. 669 S.E.2d at 318 n.3 (Hudson, J., dissenting). Petitioner made no Contract Clause argument before the Superior Court, the North Carolina Court of Appeals or the North Carolina Supreme Court. Justice Hudson noted that she would "remand to the trial court to hold an evidentiary hearing to ensure that [NC DHHS' lien] is not applied to settlement proceeds aside from those designated to reimburse medical expenses." *Id.* at 319.

REASONS FOR DENYING THE PETITION

The North Carolina Supreme Court properly concluded that the North Carolina statute at issue is consistent with this Court's decision in *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006). The decision below is not in conflict with any other state court of last resort or any circuit court. Not only is this petition a poor vehicle for resolving the question presented, one of the constitutional arguments raised by the petition was

not pressed or passed upon in the state courts. Review by this Court is not warranted.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT OR ANY CIRCUIT COURT.

Petitioner has failed to demonstrate that the decision of the North Carolina Supreme Court conflicts with a decision of the highest court of any other State or with any circuit court. No other state court and no federal appellate court has addressed the specific issue raised here, namely, whether a state statute that denotes a specific percentage of a monetary settlement as medical damages is consistent with *Ahlborn*. The lower courts are just beginning to address what procedures are appropriate to allocate state tort settlements.

Petitioner relies on decisions from New York, Idaho and California in cobbling together its argument that there is substantial conflict among the States. Of these, only the Idaho decision is a decision of the highest court of the State, and that decision is not at odds with the decision of the highest court of North Carolina.

In *Idaho Department of Health & Welfare v. Hudelson*, 196 P.3d 905 (Idaho 2008), the court found

that *Ahlborn* does not prohibit States from implementing procedures on how to allocate unallocated settlements. Idaho has a statutory procedure for allocating settlements that is very different from the North Carolina procedure in that the Idaho statute has no cap on the amount that may be recovered by the State. The Idaho court, concluding that the Idaho statute establishes a rebuttable presumption that the settlement or judgment applies first to the payment of medical expenses, determined that *Ahlborn* did not overrule Idaho's statutory procedure for determining a settlement allocation. 196 P.3d at 910-11. *Hudelson*, therefore, turned on a statutory specific application of Idaho law.

The California decision and the New York decisions relied upon by Petitioner are not decisions of the highest courts of those States. The California decision, like the Idaho decision, turns on a statutory specific application of state law. The California decision, which determined that a hearing was necessary to allocate the settlement, was applying a California statutory provision that requires that a hearing be held to allocate damages when there is no agreement between the State and the beneficiary. *Bolanos v. Superior Court*, 87 Cal. Rptr. 3d 174, 178 (Cal. Ct. App. 2008), *review denied*, 2009 Cal. LEXIS 2608 (Cal. Mar. 11, 2009).

The New York decisions, as recognized by Petitioner, are not wholly consistent in their application of the principles of *Ahlborn*, and thus, the law in New York has not yet percolated to the point where it might be deemed in conflict with North Carolina law. Furthermore, the New York courts merely adopted two different approaches for determining a fair allocation of the damages. North Carolina has a third approach. The fact that there are different acceptable approaches to allocating damages does not create a conflict among the courts.

Petitioner has also failed to demonstrate that the differing responses of state legislatures to the ruling in *Ahlborn* justifies this Court's intervention. Petitioner offers only a conclusory assertion that certiorari is appropriate because the legislative responses have been inconsistent, and Petitioner offers no analysis or authority for this conclusion. Contrary to Petitioner's assertion, the fact that some state legislatures modified their laws in response to *Ahlborn* does not indicate that those state legislatures that did not modify their laws are out of compliance with this Court's ruling. The fact that the different state legislatures have had differing responses to the holding in *Ahlborn* merely affirms the unremarkable principle that state tort laws differ. This fact does not justify review by this Court.

Thus, not only is there no conflict between the North Carolina Supreme Court decision and the decision of another State's highest court or of a federal court of appeals, but state legislatures and state courts are only just beginning to tackle the issue of how to allocate tort settlements when the State has a subrogation interest in the medical portion of the damages. It is premature for this Court to grant certiorari at this time.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *ARKANSAS DEPARTMENT OF HEALTH & HUMAN SERVICES v. AHLBORN.*

Petitioner argues that the North Carolina statute at issue, N.C. Gen. Stat. § 108A-57, is "materially indistinguishable" from the Arkansas statute declared invalid by this Court in *Ahlborn*. Pet. 10 n.7. Petitioner's efforts to discredit the decision below fail for two reasons. First, in *Ahlborn*, this Court indicated that it may be appropriate for a State to employ rules and procedures for allocation of tort settlements in order to eliminate "settlement manipulation" by the litigants. 547 U.S. at 288 n.18. The allocation procedure enacted by the North Carolina General Assembly is both fair and serves to eliminate such manipulation. Second, Petitioner is mistaken in his

assertion that the North Carolina statute and the Arkansas statute are indistinguishable.

In *Ahlborn*, this Court did not resolve whether the federal anti-lien statute precludes States from adopting allocation rules "to meet concerns about settlement manipulation." 547 U.S. at 288 n.18. States should be permitted to utilize a streamlined process that will minimize improper manipulation by the parties, will reduce litigation costs and is fair to all concerned. The North Carolina statute achieves these goals. The statute caps the amount of recovery by the Medicaid program at one-third of the settlement. N.C. Gen. Stat. § 108A-57. Given that "three times the special damages is often used as a rule of thumb for settling personal injury claims," North Carolina's one-third cap is grounded in how attorneys and insurance adjusters typically value tort cases. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 58 n.248 (1982).

Petitioner attempts to create the impression that the North Carolina Supreme Court chose to disregard the holding in *Ahlborn*. Specifically, Petitioner characterizes the North Carolina statute as essentially identical to the Arkansas statute and proceeds to argue that the *Ahlborn* decision is therefore dispositive. The North Carolina and Arkansas statutes are fundamentally different. The Arkansas statute allowed the State to recover all expenses paid

by Medicaid, even if this meant that Arkansas would get "the whole settlement and the recipient is left with nothing." 547 U.S. at 278. In contrast, the North Carolina statute caps the State's recovery at "one-third of the gross amount obtained or recovered." N.C. Gen. Stat. § 108A-57(a) (2009). Thus, North Carolina's statute allocates in advance the proceeds of any settlement between medical costs and other damages. Additionally, the North Carolina statute limits the State's recovery to the amount of the settlement representing actual medical expenses. As such, the North Carolina statute is clearly distinguishable from the Arkansas statute at issue in *Ahlborn*. The North Carolina Supreme Court concluded that N.C. Gen. Stat. § 108A-57 provides "a reasonable framework that comports with the requirements of federal Medicaid law" and that the statute is wholly consistent with *Ahlborn's* holding that the amount of reimbursement cannot exceed the portion of a settlement representing medical expenses. 669 S.E.2d at 314.

The North Carolina statute obviates the need for a post-settlement hearing to determine what portion of that settlement represents medical expenses.[2] The

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[2] Labeling the North Carolina statute as "mandatory" or "irrebuttable" is erroneous. *See* N.C. Advocates for Justice Amicus Br. 9. Prior to a final settlement between a Medicaid recipient and a tortfeasor, the parties can obtain the State's advance agreement to an allocation specific to

statute establishes an efficient and fair allocation formula, rather than requiring cumbersome, case-by-case judicial determination. Petitioner's assertion that *Ahlborn* requires an evidentiary hearing is incorrect. Rather, in *Ahlborn*, this Court expressly recognized that "submitting the matter to a court" was one alternative to "obtaining the State's advance agreement to an allocation." 547 U.S. at 288. Below, the North Carolina Supreme Court appropriately concluded that N.C. Gen. Stat. § 108A-57 "protects plaintiffs' interests while promoting efficiency in Medicaid reimbursement cases." 669 S.E.2d at 314.

The North Carolina statute declares, in advance of any negotiated settlement, the State's agreement that it will not seek more than one-third of the recovery. Petitioner, however, claims that North Carolina is bound by whatever the Medicaid recipient and the tortfeasor "designate" to be reimbursement for past medical expenses. Petitioner asserts that *Ahlborn* prohibits North Carolina from seeking reimbursement

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their case. As correctly noted by the North Carolina Supreme Court, "plaintiffs are free to negotiate a settlement with the State for a lien amount less than that required by our statutes." 669 S.E.2d at 313. Contrary to the position of his amicus, Petitioner acknowledges that the presumptive allocation would give way where a plaintiff is able to "negotiate a settlement with the State for an amount less than that required by North Carolina statutes." Pet. 8.

from any settlement proceeds unless those proceeds have been specifically "earmarked" by the plaintiff and the tortfeasor as reimbursing the plaintiff for actual medical expenses. Pet. 15 (citing *Andrews*, 669 S.E.2d at 316 (Hudson, J., dissenting)).

Petitioner further asserts that the holding in *Ahlborn* prohibits North Carolina from recovering any monies "which exceed the pro rata portion *designated* as reimbursement for medical payments made." Pet. 16 (emphasis added). Petitioner's statement, however, takes the language of the *Ahlborn* decision out of context. In *Ahlborn*, the tortfeasor accepted liability for only one-sixth of the recipient's total damage claim, and the parties "stipulated that only $35,581.47 of that sum represents compensation for medical expenses." 547 U.S. at 280. Summarizing this stipulation, this Court stated that Arkansas had conclusively stipulated to the portion of Ahlborn's settlement proceeds that were properly "*designated* as payments for medical costs." 547 U.S. at 288 (emphasis added). This Court's use of the word "designated," when read in context, refers to what Ahlborn and Arkansas agreed to as a result of their stipulation. Petitioner's assertion that a plaintiff and the tortfeasor have the unfettered right to "designate" which portions of a settlement are for past medical expenses cannot be reconciled with the actual language of the *Ahlborn* decision.

In *Ahlborn,* Arkansas' stipulation conclusively answered the question as to how much of the settlement was properly attributable to past medical payments. Here, North Carolina entered into no such stipulation. Rather, North Carolina's statute put the Medicaid recipient on notice that, in the absence of an agreement between the State and the recipient to the contrary, the statutory formula would govern how the settlement proceeds are allocated between past medical expenses and other damages. Such a result is consistent with *Ahlborn*.

III. PETITIONER'S CONTRACT CLAUSE ARGUMENT WAS NOT PRESSED OR PASSED UPON IN THE STATE COURTS.

Petitioner argues that this Court should grant certiorari to resolve whether the North Carolina statute violates the Contract Clause, U.S. Const. art. I, § 10, cl. 1. Pet. 30-33. That issue, however, was not pressed or passed upon in the state courts. *See Andrews*, 669 S.E.2d at 318 n.3 (Hudson, J., dissenting) (recognizing that "neither party has raised the issue of unconstitutional impairment of contract"). Accordingly, that issue is not properly presented to this Court. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) ("[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that

rendered the decision we have been asked to review.'") (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)).

The majority opinion of the North Carolina Supreme Court does not even reference the Contract Clause. 669 S.E.2d at 311-14. The issue was not raised by Petitioner before the trial court or the North Carolina appellate courts. Moreover, the issue was not set out in an assignment of error in the state appellate courts or in Petitioner's Notice of Appeal to the North Carolina Supreme Court. Accordingly, this issue has been abandoned under North Carolina law. *See* N.C. App. R. 10(b)(1) (to preserve issue for appellate review, it must be presented to the trial court); N.C. App. R. 28(a) (issues not presented in brief to appellate courts are deemed abandoned); N.C. App. R. 10(a) (issues not set out in assignment of error in the record on appeal are abandoned); N.C. App. R. 14(b) (Notice of Appeal must set out issues to be presented to the North Carolina Supreme Court). Thus, the North Carolina Supreme Court did not address this issue because it had not been properly preserved under North Carolina law. *See Bd. of Dirs. v. Rotary Club,* 481 U.S. 537, 550 (1987) ("When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.") (internal quotations omitted). Although the dissenting opinion asserts that the North Carolina statute violates the

Contract Clause, this does not alter the fact that the issue was not passed upon by the majority opinion of the North Carolina Supreme Court. This Court should not accept for review an issue that was not pressed or passed upon in the state courts. *Clark v. Arizona*, 548 U.S. 735, 765 (2006); *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Illinois v. Gates*, 462 U.S. 213, 219 (1983).

Moreover, Petitioner's Contract Clause argument lacks merit. The allocation formula set out in N.C. Gen. Stat. § 108A-57 was enacted by the North Carolina General Assembly in 1996. Act of Aug. 3, 1996, ch. 18, § 24.2, 1995 N.C. Sess. Laws 631, 775. The settlement agreements between Katelyn Andrews' guardian and the tortfeasors were entered into in 2005. The Contract Clause does not authorize the parties to circumvent the provisions of a state statute that was in force nearly a decade prior to the contract at issue. *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (Contract Clause applies to state law changes that "impair the obligation of pre-existing contracts"); *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 446 (1903) ("The contract clause of the Constitution of the United States has reference only to a statute of a State enacted after the making of the

contract whose obligation is alleged to have been impaired.").[3]

IV. THE PETITION IS NOT A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The present case is not a good vehicle for resolving the issue presented by the petition. Despite the express requirements of Supreme Court Rule 14.1(i), Petitioner has failed to include in the petition a copy of the findings of fact and conclusions of law reached by the trial court. Instead, Petitioner has reproduced selected excerpts of the trial court's decision, apparently because the order was filed under seal. Pet. App. 40a-41a. Respondent, however, is aware of no order in this case nor court rule that permits Petitioner to unilaterally "unseal" portions of that order while depriving this Court of the benefit of the remainder of the order.

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[3] Similarly, Petitioner's Contract Clause argument is without merit given that Petitioner admits that the settlement agreements do not allocate the settlement between past medical expenses and other claimed damages. Pet. 3. Petitioner cannot argue that the North Carolina allocation statute impairs a contractual obligation when the contracts at issue are silent with respect to the allocation of damages.

The effect of Petitioner's action is to hide from this Court the terms of the settlement agreements, including the amount of those settlements. Given the amount of the settlements, Respondent believes that the facts of this case make it an extremely poor vehicle for resolving the question presented. The petition seeks to challenge the one-third cap set out in N.C. Gen. Stat. § 108A-57(a) as demanding excessive reimbursement, when the facts of this case (had they been made available to this Court) would show that the one-third cap never came into play given that the settlement proceeds are more than three times the medical expenses paid by Medicaid. In essence, Petitioner is seeking to challenge the North Carolina statute in a vacuum because the sealed documents demonstrate that the reimbursement sought by North Carolina was fair and reasonable, particularly when reviewed in light of the total settlement proceeds received by Andrews. As a result of Petitioner's failure to comply with Supreme Court Rule 14.1(i), this Court has been deprived of the opportunity to independently confirm that the arguments that the petition brings forward are not supported by the facts of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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